Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1106

JOSEPH A. ZAMBITO,
Petitioner,

versus

REECE H. BLAIR, Sheriff of
Ohio County, West Virginia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Joseph A. Zambito, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 26, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix beginning at page A-1. No opinion was rendered by the United States District Court for the Northern District of West Virginia.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 26, 1979. This petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the fourth amendment to the United States Constitution apply to interstate extradition proceedings?

2. If the fourth amendment does apply:

a. Was the extradition warrant issued on August 14, 1978, by the Governor of West Virginia invalid under the fourth amendment's proscription that "no Warrants shall

issue, but upon probable cause," because no judicial determination of probable cause appeared among the extradition documents which had accompanied the demand of the Governor of Florida that Zambito be arrested and extradited to Florida, where Zambito is charged, by way of a prosecutor's *information*, with the commission of a felony?

b. Should the district court have admitted into evidence and considered, in determining whether or not the extradition warrant had issued in violation of the fourth amendment, a document (assuming it to be authentic) which purported to be a judicial finding of probable cause made in the demanding state previous to the issuance of the extradition warrant, but which had wholly bypassed the executive route established by the extradition clause in article IV, section 2, of the United States Constitution (and which had not been presented or made known in any of the state and federal habeas proceedings until after the district court had conditionally awarded a writ of habeas corpus)?

c. Should the district court have admitted into evidence and considered, in determining whether or not the extradition

warrant had issued in violation of the fourth amendment, such purported judicial finding of probable cause although Florida statutory law established no procedure for such a finding prior to the time that a defendant has been taken into custody?

d. If it was proper for the district court to admit into evidence and consider the purported judicial finding of probable cause, should the district court have given Zambito a greater opportunity to obtain and present evidence that the finding had been fabricated after the extradition warrant had issued or, perhaps, after the district court had conditionally awarded the writ of habeas corpus?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, art. IV, sec.2, cl. 2:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

United States Code, tit. 18, sec. 3182:

> Wherever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded

with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

Rules Governing Section 2254 Cases,

Rule 8:

(a) *Determination by Court.* If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record,

if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

. . . .

(c) *Appointment of Counsel; Time for Hearing.* If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any state of the case if the interest of justice so requires.

Rules Governing Section 2254 Cases,

Rule 11:

The Federal Rules of Civil

Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

Rules of Civil Procedure for the United States District Courts, Rule 56 (Summary Judgment):

. . . .

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages.

. . . .

Florida Rules of Criminal Procedure, Rule 3.131 (See Appendix, pp. A-18 through A-20, for full text):

(a) Nonadversary Probable Cause Determination.

(1) *Defendants in Custody.* In all cases where the defendant is in custody, a nonadversary probable cause determination shall be held before a magistrate within 72 hours from the time of the defendant's arrest . . . .

STATEMENT OF THE CASE

On May 31, 1978, William P. Cervone, an assistant prosecutor for the Eighth Judicial Circuit of Florida, executed and filed in the Circuit Court of the Eighth Judicial Circuit of Florida, in and for Alachua County, an *information* which charged that Joseph A. Zambito, the petitioner in this case, had committed the crime of robbery with a firearm on or about April 15, 1978, in Alachua County, Florida. The Governor

of Florida, on June 14, 1978, executed a formal, written demand to the governor of West Virginia that Zambito be arrested and extradited to Florida. The formal demand was accompanied by a written appointment by the Governor of Florida, dated June 14, 1978, of agents to receive Zambito and transport him to Florida, and was accompanied also by copies of the following papers, which were, by reference, certified as authentic by the Governor of Florida in the formal demand:

(1) The information charging Zambito with the crime of robbery with a firearm, a felony under Florida law.

(2) An "Affidavit of Probable Cause" made and executed by John G. McManus, a deputy sheriff of Alachua County, Florida, and sworn and subscribed before "John J. Crews, Circuit Judge," on June 2, 1978. In the affidavit, McManus recited in detail the information upon which he concluded that Zambito had been the perpetrator of the alleged robbery.

(3) An application, dated June 6, 1978, from Eugene T. Whitworth, prosecutor for the Eighth Judicial Circuit of Florida, to the Governor of Florida, in

which the prosecutor requested that formal demand be made by the Governor of Florida for the extradition of Zambito from West Virginia, where Zambito was located.

On August 14, 1978, after deciding to comply with the formal demand, the Governor of West Virginia issued an extradition warrant in which he directed that Zambito be arrested and delivered to agents of Florida for his return to that state. Pursuant to the extradition warrant, the respondent in this case, Reece H. Blair, Sheriff of Ohio County, West Virginia, arrested Zambito on September 6, 1978. On the next day, Zambito was taken before James G. McClure, Judge of the Circuit Court of Ohio County, West Virginia, who informed Zambito of the demand for his extradition, of the crime with which he had been charged in Florida, and of his right to test the legality of his arrest by applying for a writ of habeas corpus. Upon being advised of Zambito's desire to test the legality of his arrest, Judge McClure allowed Zambito a reasonable time within which to apply for the writ and admitted him to bail. Zambito did petition for

the writ, contending, in part, that the extradition warrant and his detention under it were invalid under the United States Constitution because they were not supported by a *judicial* determination of probable cause. The Circuit Court of Ohio County, West Virginia, denied Zambito's petition, adjudging that the Florida extradition papers upon which the extradition warrant issued were "legally and constitutionally sufficient." Zambito's petition for an appeal from that judgment was denied on December 12, 1978, by the West Virginia Supreme Court of Appeals, highest court in West Virginia.

On December 14, 1978, Zambito, having exhausted remedies available in the courts of West Virginia, filed (under 28 U.S.C. sec. 2254) a petition for a writ of habeas corpus in the United States District Court for the Northern District of West Virginia. The district court, after considering the petition and the extradition papers exhibited with the petition, issued a show-cause order against Sheriff Blair returnable on December 21, 1978, and stayed the extradition of Zambito until then.

On December 21, 1978, the Sheriff

filed, in open court, his written answer to Zambito's petition, admitting in his answer, among other things, that the papers exhibited with Zambito's petition were true and correct copies of all of the extradition papers forwarded by the Governor of Florida to the Governor of West Virginia, upon which the extradition warrant of the Governor of West Virginia had been based and issued. The case then was submitted to the district court upon the pleadings, the exhibits filed with the petition, and the arguments of counsel. The district court, on December 21, 1978, issued the writ, finding "that no judicial determination of probable cause to believe that such offense had been committed and that the Petitioner committed it appears among the documents and papers which had been authenticated by the Governor of Florida and upon which the warrant of the Governor of West Virginia had been based and issued . . . ," and holding that, where a person is charged by way of an information, "a judicial determination of probable cause is a prerequisite to interstate extradition . . ." under the fourth amendment to the United States

Constitution. The court, however, recited in its order that the Sheriff, "as a precautionary measure, should be permitted to consult further with officials of the State of Florida concerning the nonexistence of a judicial determination of probable cause . . . and to produce evidence, if any, that such a judicial determination had in fact been made," and accordingly ordered (on its own motion) that the Sheriff be granted thirty days within which to present any such evidence. Upon the presentation of any such evidence, the court would "hold such further hearings or take such further action as it may deem appropriate." The court further ordered that, during the thirty-day period, the "effectiveness of the writ" would be stayed and the stay of Zambito's extradition would be continued.

On January 12, 1979, the Sheriff filed in the district court a written motion to modify the order of December 21, 1978. Attached to the motion was a document (certified on December 22, 1978, as true and correct by a Florida circuit court clerk and bearing the seal of that court) which purported to be a brief "Order Finding

Probable Cause" signed by John J. Crews, a Florida circuit court judge, on May 31, 1978.

On January 18, 1979, Zambito, his attorney, and the Sheriff's attorney appeared before the district court judge in accordance with telephonic notifications to appear. On that date, Zambito filed, in open court, a written response to the Sheriff's motion. In the written response, and in oral arguments before the court, Zambito contended that:

(1) The purported judicial finding of probable cause could not be considered by the district court in determining whether or not the extradition warrant had issued in violation of the fourth amendment's proscription that "no Warrants shall issue, but upon probable cause," because the finding had not been included, as required by constitutional implication, in the formal extradition papers upon which the Governor of West Virginia had acted. In other words, the warrant was constitutionally invalid when issued because the extradition papers (the demand of the Governor of Florida and the supporting papers which accompanied the demand) failed to show on their

face the existence of any judicial determination of probable cause, and could not be validated by the later presentation in court of a purported judicial finding which had entirely bypassed the executive path prescribed by the extradition clause in article IV, section 2.

(2) The purported judicial determination of probable cause should be afforded no constitutional efficacy because Florida statutory law provided no procedure for such a determination prior to the time that a defendant has been arrested in Florida.

(3) Zambito should be afforded a reasonable opportunity to seek, obtain, and present evidence that the purported "Order Finding Probable Cause" was, in fact, made (or fabricated) and signed after the extradition warrant had issued or, perhaps, after the district court had conditionally awarded the writ of habeas corpus. (Specific factors from which one could reasonably infer that a strong possibility of fraud existed were explained to the court, and those factors are listed in this petition on pages 27-29.)

Overruling Zambito's contentions,

the district court, on January 18, 1979, withdrew the writ previously issued and denied Zambito's petition. On the same date, Zambito filed in the district court his notice of appeal and the district court judge awarded a certificate of probable cause for the appeal.

On appeal to the United States Court of Appeals for the Fourth Circuit, Zambito unsuccessfully made the same contentions as were made in the district court.

REASONS FOR GRANTING THE WRIT

I.

The court of appeals, in its opinion in this case, has decided important questions of federal law which have not been, but should be, settled by this Court.

The questions are important because they concern the application of the requirements of the fourth amendment to interstate extradition, a proceeding which is used frequently by the states and which is based upon the extradition clause in article IV, section 2, of the United States Constitution. The questions also are important because they indirectly

concern other frequently used proceedings by which a person may be arrested or detained in one state for the alleged commission of a crime in another state.[1]

The questions should be settled by this Court because of the need for clarity and uniformity in the application by the states, state courts, and lower federal courts of fourth-amendment standards to interstate extradition proceedings. While much of this Court's opinion in the recent case of *Michigan v. Doran*, 439 U.S. 282 (1978), seems to be couched in language intimating that the fourth amendment applies in the extradition context, this Court nevertheless avoided expressly holding that it does apply when it concluded, in the third footnote in *Doran*, that

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1 For example, the Uniform Criminal Extradition Act provides for proceedings, prior to or pending the initiation of extradition proceedings, where a judge or magistrate in one state is *required* to issue an arrest warrant (commonly known as a "fugitive warrant") upon the sworn complaint of "any credible person" charging any person "with the commission of any crime in any other state," or upon a

> "because Arizona (the demanding state) provided a judicial determination of probable cause for the arrest warrant, we need not decide whether the criminal charge on which extradition is requested must recite that it was based on a finding of probable cause."

Mr. Justice Blackmun, referring in his concurring opinion in *Michigan v. Doran* to the language quoted above, commented:

> "Despite the obvious importance of the issue, the Court refuses the opportunity afforded by this case to clarify the requirements of the Fourth Amendment in interstate extradition. Instead, the Court avoids the question

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complaint, supported by the affidavit of "any credible person in another state," that a crime has been committed in such other state and that the accused "has been charged in such state with the commission of the crime." See, *e.g.*, Fla. Stat. Ann. §§ 941.13-.18; W. Va. Code ch. 5, art. 1, §§ 9(d)-(i).

> on which certiorari was granted by holding that, even if the Fourth Amendment does apply to interstate extradition, its requirements, in this case, were satisfied. . . . This convenient assumption, in my view, perpetuates confusion in an area where clarification and uniformity are urgently needed."

The petitioner respectfully submits that the case at bar, because of its factual peculiarities, affords an even greater opportunity than *Doran* for this Court (borrowing the words of Mr. Justice Blackmun from his concurring opinion in *Doran*) "to articulate, for the guidance of state courts, the proper accommodation between the Fourth Amendment and the Extradition Clause." The petitioner respectfully submits, further, that the need for clarity and uniformity in the area of interstate extradition is no less urgent now than before the decision of this Court in *Michigan v. Doran*.

II.

In a nutshell, the court of appeals decided in this case that the fourth amendment does apply in the extradition

context, but then concluded that

> "the fourth amendment, as applied to the states by the fourteenth amendment, requires only that, prior to an extradition, there in fact have been a finding of probable cause by a neutral judicial officer, not that the demanding papers, additionally, must say so.
> ". . . .
> ". . . . It is the actual fact, not the statement or lack of a statement that, in the end, matters." Appendix, pp. A-9 through A-11.

To hold that the extradition warrant is invalid simply because a judicial finding of probable cause, actually made, did not appear on the face of the extradition papers, reasoned the court of appeals, would serve no fourth-amendment interests of Zambito and would impose on the Governor of West Virginia "mere paper shuffling requirements" by compelling him "to go back and re-issue a warrant after a missing certification of a probable cause finding which had actually

taken place is supplied." Appendix, p. A-13.

While the petitioner does not quarrel with the opinion of the court of appeals that the fourth amendment does, indeed, apply to interstate extradition proceedings, and that a *judicial* determination of probable cause, under the rationale of *Gerstein v. Pugh*, 420 U.S. 103 (1975), must precede extradition, he does take issue with the conclusion of the court of appeals that a judicial determination of probable cause need not accompany the extradition papers upon which the governor of an asylum state issues and bases his extradition warrant.

The petitioner respectfully contends that the reasoning of the court of appeals, in that respect, was fallacious. The court focused its attention on the fact (if it be so) that a judicial determination of probable cause had been made, rather than on the critical fact that the Governor of West Virginia had issued the warrant without the benefit of anything before him to indicate that the requisite judicial determination had been made. It is the fact that an official issued a warrant without regard to the existence

or nonexistence of the requisite probable-cause finding which offends the fourth amendment and which, in the end, matters. The fact that the requisite probable-cause finding existed and could have been, but was not, made known to the Governor of West Virginia rendered the arbitrary issuance of his warrant no less arbitrary.

If, as a consequence of the arbitrary issuance of the warrant, the Governor must re-issue the warrant after the requisite probable-cause finding has been properly supplied to him, the so-called "paper shuffling" is a small penalty to pay for offending the fourth amendment. It will, on the other hand, serve in the future as an appropriate reminder that he, and the governors of other states, must insist upon proper proof of a judicial finding of probable cause as a prerequisite to the valid issuance of any extradition warrant.

III.

In the extradition context, Florida statutory law makes no provision whatever for a judicial determination of probable cause against a fugitive who is charged by information. Rule 3.131 of the *Florida*

Rules of Criminal Procedure governs pre-trial probable-cause determinations and adversary preliminary hearings in Florida, entrusts such determinations and hearings to "magistrates," and applies only in cases "where the defendant is in custody" after his "arrest" in Florida. See full text of Rule 3.141 in Appendix, pp. A-18 through A-20.

In the case at bar, the purported judicial determination of probable cause against Zambito, dated May 31, 1978, recites that it was made pursuant to Rule 3.131 and was signed by a Florida circuit court judge. Since Zambito had not been arrested in Florida and was never in custody there, he contended in the district court and in the court of appeals that no constitutional force, efficacy, or meaning should be ascribed to the probable-cause finding for fourth-amendment purposes. He argued that in *Michigan v. Doran*, 439 U. S. 282 (1978), this Court reviewed and summarized Arizona's procedural laws governing nonadversary probable-cause determinations for the apparent purpose of demonstrating that the determination made in that case by a justice of the peace in Arizona, whose governor demanded the extradition of

Doran from Michigan, had not been unreliable or unfair. He also noted that this Court, in *Gerstein v. Pugh*, 420 U.S. 103, 124-25 (1975), after striking down Florida's former procedural laws which afforded no pre-trial determination of probable cause, admonished:

> "Whatever procedure a State may adopt, it must provide a *fair and reliable* determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made either before or promptly after arrest." (Emphasis added.)

The district judge was of the opinion "that the Court cannot inquire into the *validity* of the probable cause finding," citing as authority (in its order of January 18, 1979) the *Doran* and *Gerstein* cases and, as well, *Ierardi v. Gunter*, 528 F.2d 929 (1st Cir. 1976). (Emphasis added.) The court of appeals concluded, in effect, that the Florida circuit court had the inherent power, under the Florida Constitution, to make the probable-cause finding and that Florida procedure, in any event, was of no concern.

The petitioner believes that this Court

should settle the question of what, if any, constitutional efficacy should be ascribed to a judicial probable-cause finding made by a state trial judge in the absence of any state procedural rules relating to the making of such a finding. In particular, is the judicial officer's *neutrality* or the *reliability* of his finding nullified or affected in any way, for fourth-amendment purposes, by the absence of such procedural rules?

IV.

The petitioner's counsel unsuccessfully contended in the district court, in writing and in oral arguments on January 18, 1979, that the petitioner should be given a reasonable opportunity to seek, obtain, and present evidence concerning what he considered to be a likelihood that the purported judicial finding of probable cause dated May 31, 1978, and filed in the district court on January 12, 1979, had been made (or fabricated) and signed after the extradition warrant had issued or, perhaps, after the district court had conditionally awarded the writ of habeas corpus on December 21, 1978.

The reasons for the request of Zambito's counsel for such a reasonable

opportunity was based upon the following enumerated factors, which also were set forth in Zambito's brief and mentioned in oral arguments in the court of appeals:

(1) If the finding had been made after the extradition warrant had issued on August 14, 1978, it cannot be considered as a "supplement" to the formal extradition papers upon which the Governor of West Virginia acted (although Zambito's counsel contends that it cannot be considered as a "supplement" in any event).

(2) If the finding had been made after the writ of habeas corpus had been awarded conditionally on December 21, 1978, it certainly cannot be considered as a "supplement" to the formal extradition papers either.

(3) The production and filing of the "newly discovered" finding was a surprise to Zambito and his counsel.

(4) An investigation would have to be made in Florida, and arrangements for an investigation and discovery would have to be made with Florida counsel.

(5) More than a mere possibility exists that the finding had been signed on December 22, 1978, antedated, and surreptitiously slipped into the circuit

court file of the case in Florida:

(a) The document (front and back) bears no evidence of having been stamped ("clocked in") by the circuit court clerk with the date and time of filing, although such stamping is required and customary there and the charging documents, included in the extradition papers, bear stamped dates of filing.

(b) The "3" in the handwritten, purported date of the document, the "31st day of May, 1978," appears to have been converted from a "2", suggesting that the person who signed the document commenced writing a date that began with a "2", such as the 22nd day of December, 1978.

(c) The case number does not appear on the document in the space provided, suggesting, perhaps, that the document was hurriedly prepared on December 22, 1978 (the date of certification by the clerk).

(d) The purported finding had not been brought to light in any of the earlier state-court proceedings.

(e) The purported finding had not accompanied the formal extradition papers.

(f) Rule 3.131 of the *Florida Rules of Criminal Procedure*, discussed earlier, provides for no probable-cause determination until after a fugitive is "in custody" in Florida.

Those factors enumerated above led Zambito's counsel to believe that he had good cause for his requests for a reasonable opportunity to obtain evidence and to present it in an evidentiary hearing in the district court.

While the petitioner realizes that a district court judge has broad discretionary powers under the *Rules Governing Section 2254 Cases in the United States District Courts*, he nevertheless respectfully contends that the district judge abused his discretion in failing to afford him the reasonable opportunity requested. He respectfully contends, further, that when the court of appeals held that "the disposition in what amounted to a summary judgment was proper" (appendix, p.A-17), it so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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January 16, 1980

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6156

Joseph Alphonso Zambito,
Appellant

v.

Reece H. Blair, Sheriff of
Ohio County, West Virginia,
Appellee

Appeal from the United States District Court for the Northern District of West Virginia, at Parkersburg. Charles H. Haden, II, District Judge.

Argued: October 5, 1979
Decided: November 26, 1979

Before BUTZNER, FIELD and MURNAGHAN, Circuit Judges.

William R. Metzner (Miller & Metzner on brief) for Appellant; Frances W. McCoy, Assistant Attorney General (Chauncey H. Browning, Attorney General on brief) for Appellee.

MURNAGHAN, Circuit Judge:

This appeal from the dismissal of a petition for federal habeas corpus concerns the prerequisites which the fourth amendment establishes for interstate extradition.

I.

On May 31, 1978, William P. Cervone, a prosecutor for the Eighth Judicial Circuit of Florida, executed and filed an information which charged that, in Florida, Joseph A. Zambito, the appellant in this case, had committed the crime of robbery with a firearm. The governor of Florida, on June 14, 1978, executed a written demand to the governor of West Virginia that Zambito be arrested and extradited to Florida. The request for extradition was accompanied by copies of:

(1) The information charging Zambito with armed robbery in Florida.

(2) An "Affidavit of Probable Cause" dated June 2, 1978, which had been executed by John G. McManus, a Florida deputy sheriff, and sworn before John J.

Crews, a Florida circuit judge. In the affidavit McManus recited the data which had led him to identify Zambito as the perpetrator of the robbery which was charged.

(3) An application, dated June 6, 1978, from the Florida prosecutor to the governor of Florida requesting a demand for the extradition of Zambito.

(4) A written appointment by the governor of Florida, dated June 14, 1978, of agents to receive Zambito and transport him to Florida.

After deciding to comply with the Florida demand, the governor of West Virginia, on August 14, 1978, issued a warrant of arrest for Zambito.[1] Pursuant to the warrant, the appellee, Reece Blair, a West Virginia sheriff, arrested Zambito. The next day Zambito was taken before a West Virginia circuit court judge who informed him of the demand for his extradition, of the crime with which he had been charged, and of his right to test the legality of his arrest by applying

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1 See W. Va. Code § 5-1-8 (1979).

for a writ of habeas corpus. Zambito was then admitted to bail and given a reasonable time within which to apply for the writ.[2] He did petition for the writ, contending, in part, that the arrest warrant and his detention under it were invalid under the United States Constitution because they were not supported by a judicial determination of probable cause. Zambito's petition was denied by the West Virginia circuit court, and an appeal from that judgment was denied by the Supreme Court of Appeals of West Virginia.

Having exhausted remedies available in the courts of West Virginia, on December 14, 1978, Zambito filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of West Virginia. On December 21, 1978, the court issued the writ, holding that, under the fourth amendment, a judicial determination of probable cause is a prerequisite to interstate extradition[3] and finding "that no

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2 See id. § 5-1-9.

3 Given the facts of this case, we have

judicial determination of probable cause to believe that (robbery with a firearm) had been committed and that (Zambito) had committed it appears among the documents and papers which had been authenticated by the Governor of Florida and upon which the warrant of the Governor of West Virginia had been based and issued." The court further ordered that Sheriff Blair be granted thirty days "within which to present to the Court evidence, if any, that a judicial determination of probable cause had been made in Florida with respect to the said offense with which the petitioner is there charged." The court further ordered that, during the thirty-day period, the effectiveness of

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no occasion to review the correctness of that legal conclusion. We assume for present purposes that it is correct. The extradition clause (Article IV, § 2, par. 2) of the Constitution contemplates "a summary and mandatory executive proceeding." Michigan v. Doran, 439 U.S. 282, 288 (1978). In that case, however, a judicial finding of probable cause had been made in the demanding state, and nothing in the opinion, taken in full context, would justify a conclusion that the result would have been the same absent such a judicial finding.

the writ would be stayed and that a stay of Zambito's extradition would be continued.

On January 12, 1979, the West Virginia sheriff filed in the district court a motion to modify the December 21, 1978 order. Attached to the motion was a certified copy of an "Order Finding Probable Cause", which was dated May 31, 1978, and which was signed by John J. Crews, a Florida circuit judge. On January 18, 1979, the district court withdrew the writ previously issued and denied Zambito's petition. The court also lifted the stay against his extradition and denied his requests for an evidentiary hearing and for time within which to obtain evidence that the Florida finding of probable cause had been contrived and backdated.

On Appeal Zambito makes the following contentions:

1. The governor's warrant was constitutionally invalid because the papers before the governor when he issued it failed to show on their face a judicial finding of probable cause.

2. Even if extrinsic documents could be considered in assessing the

constitutional validity of the governor's warrant, the finding of probable cause dated May 31, 1978 could not validate the warrant because Florida statutory law established no procedure for the judicial determination of probable cause prior to the time that a defendant has been arrested in Florida.[4]

3. Zambito should have been given a greater opportunity to obtain and to present evidence that the order showing a judicial determination of probable cause had been fabricated after the event and backdated.

We reject the contentions and affirm.

II.

As a point of departure, we recognize as a general matter, quite apart from extradition, the necessity that there actually have been a judicial finding of probable cause as a prerequisite to detention for an extended

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4 There had been, of course, no arrest of Zambito in Florida.

period of time. Gerstein v. Pugh, 420 U.S. 103, 114 (1975):

> Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. . . . Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.[5] Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

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5 As Gerstein v. Pugh, supra, makes clear, the limited exceptions for warrantless arrests by police officers under circumstances of exigency not present here clearly have no application to the present case. Such exceptions are limited by the requirement of prompt resort to a court for a finding of probable cause if the restraint is to endure for an extended period.

The same considerations should apply in the extradition context, since arrest in the asylum state and rendition of the prisoner are but introductory segments of the interruption to liberty which will continue in the demanding state. Since a judicial finding of probable cause is a necessary prerequisite for a part of the deprivation of liberty, it should be necessary for the whole.

Having accepted for purposes of this case the apparent constitutional imperative that there have been a judicial finding of probable cause to support arrest and rendition on an extradition request, we also point out that, as Michigan v. Doran, 439 U.S. 282 (1978), makes clear, an asylum state may not itself hold a traditional probable cause inquiry when the extradition documents on their face are in order and when those documents, although they do not set out the supporting facts, establish that there had been, in the demanding state, finding that there was "reasonable cause" to believe that the individual as to whom extradition was sought had committed the charged offense.

Although the situation in the

present case differs from that in Doran in that the documents seeking Zambito's extradition set out sufficient facts to support a judicial finding of probable cause, but did not include a statement that such a finding had in fact been made, the West Virginia governor need not have insisted on proof that there had been a judicial finding of probable cause in Florida. He was entitled to infer from (a) the existence of sufficient facts to support a judicial finding of probable or reasonable cause and (b) the fact that his Florida counterpart had asserted a right to extradition, that the requisite judicial action had occurred.

In such circumstances, we conclude that the fourth amendment, as applied to the states by the fourteenth amendment, requires only that, prior to an extradition, there in fact have been a finding of probable cause by a neutral judicial officer, not that the demanding papers, additionally, must say so. Where such a finding has actually been made in the demanding state before extradition, and where the person executing the governor's warrant has no substantial basis for doubting that it has been made,

execution of that warrant is not constitutionally invalid merely because the documents which were presented to the governor of the asylum state did not, at the time of their presentation, specify that the finding had been made.

We do not, of course, suggest that the circumstances would then preclude the person for whom extradition has been sought from calling attention to the omission in the demanding papers of any assertion that there has been a judicial finding of probable cause, and, from obtaining, as here, an independent court inquiry as to whether such a finding had been made. Indeed, we do not read Michigan v. Doran as precluding a similar court inquiry into the correctness of a statement contained in the demanding papers that a judicial finding of probable cause had been made. At 439 U.S. at page 290, it is made clear that the holding in Doran applies only "when a neutral judicial officer of the demanding state has determined that probable cause exists." (Emphasis added). The statement in the demanding papers that there has been a finding of probable cause is no more conclusive than would be an

absence of such a statement. It is the actual fact, not the statement or lack of a statement that, in the end, matters.

Here, the judicial finding of probable cause by the Florida court had been made on May 31, 1978, prior to the request for extradition. That fact satisfied the constitutional requirement. An omission from the extradition request of a statement of the fact did not make any less complete the compliance with the requirement for a judicial determination of probable cause. The district judge acted quite correctly in calling upon West Virginia to prove that a proper judicial finding of probable cause had been made, with unconditional issuance of the writ to follow in the absence of such proof.

By January 12, 1979, a certified copy of a Florida finding of probable cause had reached Sheriff Blair and his attorney, and had been filed in the district court. The sheriff was the governor's agent for the arrest of Zambito,[6] and the adequacy of the

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6 See W. Va. Code § 5-1-8(a) (1979).

governor's warrant for interstate extradition was extablished insofar as the Constitution was concerned. No fourth amendment interests of the defendant would be served by a constitutional imposition on the governor of West Virginia of mere paper shuffling requirements. The Constitution does not force a governor to go back and re-issue a warrant after a missing certification of a probable cause finding which had actually taken place is supplied.

III.

Zambito attacks the Florida finding of probable cause as made in circumstances not provided for in Florida law. He points out that the court in that state purported to act under a rule (Florida R. Cr. P. 3.131) providing for probable cause determinations for defendants in custody and for defendants on pretrial release, but saying nothing about determinations for persons who, like Zambito, had never been apprehended in Florida. The West Virginia sheriff's response is to refer to art. V, § 16. para. 3 of the Florida Constitution as conferring on judges power to issue all

writs necessary or proper to the complete exercise of their jurisdiction.

We need not enter such a thicket of Florida law. The Florida judge purported to exercise his authority, and in doing so issued an order which not only is presumptively valid, but also is, under the assumption on which this opinion proceeds, required by the United States Constitution for implementation of the extradition clause. Nothing in the Federal Constitution would deny such authority to the Florida judge, and his order inherently contains within itself a determination that he had such authority. Even if that represents a novel rule under Florida law, we have no occasion to invalidate its application here.

There undoubtedly may be some procedural defects so grave that they negative either the neutrality or the judicial character of the proceedings which lead up to the finding of probable cause required by the fourth amendment for purposes of the extradition clause, but the defects alleged here are not in that category.

IV.

Zambito also complains that he should have been given additional opportunity to prove that the Florida finding of probable cause was made, not on May 31, 1978, but at some later date, after the extradition request had been made. We do not necessarily accept that, if there had been no finding of probable cause when the West Virginia governor issued his warrant, the defect could not have been subsequently cured, at any time prior to actual rendition of Zambito. For present purposes, however, we shall assume, for sake of argument, that the finding must antedate the governor's warrant. Even if we make that assumption, however, there was no error in the district court's having refused Zambito an evidentiary hearing on the question of whether the order finding probable cause had been backdated. In Blackledge v. Allison, 431 U.S. 63, 80 (1977), the Supreme Court rejected the notion

> that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing. As in civil cases generally,

> there exists a procedure whose purpose is to test whether facially adequate allegations have a sufficient basis in fact to warrant plenary presentation of evidence. That procedure is, of course, the motion for summary judgment.

Although not so labeled by the district court, the proceedings here amounted to a disposition by summary judgment. Zambito and his attorney had been on notice since January 12, 1979, that the government had moved that the writ of habeas corpus be revoked on the grounds of the existence of the certified "Order Finding Probable Cause" dated May 31, 1978. The court did not act until January 18, 1979. Even though time was short and Zambito's resources available for investigation were limited, it was incumbent that he do more than simply rely on naked, totally unsubstantiated allegations of fraud based purely on suspicion. By affidavit or some other form of evidence he had to provide at the very least an adequate explanation as to why he had not been able to investigate the matter. Yet he produced nothing.

As the Blackledge Court indicated, when faced with a motion for summary judgment, the petitioner for habeas corpus is "required either to produce some contrary proof indicating that there is a genuine issue of fact to be resolved by the District Court or to explain his inability to provide such proof. Fed. Rules Civ. Proc. 56(e), (f)." 431 U.S. at 80-81. The certified "Order Finding Probable Cause" met the standards for self-authentication of domestic public documents under seal. See Fed. R. Evid. 902(1). Hence, the district court did not err when it admitted the document as genuine. The date on the document is admissible to prove that the document was in fact executed on that date. Fed. R. Evid. 803(8) (A). Because Zambito offered no rebutting evidence or explanation to suggest that there was a genuine issue of fact to be resolved, the disposition in what amounted to a summary judgment was proper.

AFFIRMED.

Rule 3.131. Pretrial Probable Cause Determinations and Adversary Preliminary Hearings

(a) Nonadversary Probable Cause Determination.

(1) *Defendants in Custody.* In all cases where the defendant is in custody, a nonadversary probable cause determination shall be held before a magistrate within 72 hours from the time of the defendant's arrest; provided, however, that this proceeding shall not be required when a probable cause determination has been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. The magistrate for good cause may continue the proceeding for not more than 24 hours beyond the above 72-hour period. This determination shall be made if the necessary proof is available at the time of the first appearance as required under Rule 3.130, but the holding of this determination at said time shall not affect the fact that it is a nonadversary proceeding.

(2) *Defendants on Pretrial Release.* A defendant who has been released from custody before a probable cause determination is made and who is able to establish that his pretrial release conditions are a significant restraint on his liberty may file a written motion for a nonadversary probable cause determination setting forth with specificity the items of significant restraint that a finding of no probable cause would eliminate. The motion shall be filed within 21 days from the date of arrest, and notice shall be given to the State. The magistrate shall, if he finds significant restraints on the defendant's liberty, make a probable cause determination within 7 days from the filing of the motion.

(3) *Standard of Proof.* Upon presentation of proof, the magistrate shall determine whether there is probable cause for detaining the arrested person pending further proceedings. The defendant need not be present. In determining probable cause to detain the defendant, the magistrate shall apply the standard for issuance of an arrest warrant, and his finding may be based upon sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded.

(4) *Action on Determination.* If probable cause is found, the defendant shall be held to answer the charges. If probable cause

is not found or the specified time periods are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Any release occasioned by a failure to comply with the specified time periods shall be by order of the magistrate upon a written application filed by the defendant with notice sent to the state or by a magistrate without a written application but with notice to the state. The magistrate shall order the release of the defendant after it is determined that the defendant is entitled to release and after the state has a reasonable period of time, not to exceed 24 hours, in which to establish probable cause. A release required by this rule does not void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and filed, together with the evidence of such probable cause, with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

(b) Adversary Preliminary Hearing.

(1) *When Applicable.* A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

(2) *Process.* The magistrate shall issue such process as may be necessary to secure attendance of witnesses within the state for the state or the defendant.

(3) *Witnesses.* All witnesses shall be examined in the presence of the defendant and may be cross-examined. Either party may request that the witnesses be sequestered. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf, and in such cases he shall be warned in advance of testifying that anything he may say can be used against him at a subsequent trial. He may be cross-examined in the same manner as other witnesses, and any witnesses offered by him shall be sworn and examined.

(4) *Record.* At the request of either party, the entire preliminary hearing, including all testimony, shall be recorded verbatim stenographically or by mechanical means, and at the request of either party shall be transcribed. If the record of the proceedings, or any part thereof, is transcribed at the request of the prosecuting attorney, a copy of this transcript shall be furnished free of cost to defendant or his counsel.

(5) *Action on Hearing.* If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall cause the defendant to be held to answer to the circuit court; otherwise, the magistrate shall release the defendant from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial.

A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and, together with the evidence received in the cause, shall be filed with the clerk of the circuit court.

(c) Additional Nonadversary Probable Cause Determinations and Preliminary Hearings. If there has been a finding of no probable cause at a nonadversary determination or adversary preliminary hearing, or if the specified time periods for holding a nonadversary probable cause determination have not been complied with, a magistrate may thereafter make a determination of probable cause at a nonadversary probable cause determination, in which event the defendant shall be retained in custody or returned to custody upon appropriate process issued by the magistrate. A defendant who has been retained in custody or returned to custody by such a determination shall be allowed an adversary preliminary hearing in all instances in which a felony offense is charged.

Amended Feb. 4, 1974, effective March 1, 1974 (289 So.2d 3); March 26, 1975, effective March 31, 1975 (309 So.2d 544); Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).